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No. 111 Original

In The

Supreme Court of the United States

October Term, 1988

STATE OF DELAWARE,

Plaintiff,

and

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF COLORADO FOR LEAVE TO INTERVENE AND COMPLAINT IN INTERVENTION

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Pursuant to rule 9 of the rules of the Supreme Court, the State of Colorado, a sovereign state of the United States of America, by and through Duane Woodard, Attorney General for the State of Colorado, moves this Court for an order permitting intervention in the above-styled case, and permitting the adoption, to the extent appropriate, of the brief in support of motion for leave to file a complaint and the amended complaint filed by the

State of (Texas), the plaintiff in intervention. In support of this motion, the State of Colorado states the following:

1. On or about May 31, 1988, this Court granted the motion of plaintiff, State of Delaware (Delaware), for leave to file a complaint invoking the original jurisdiction of this Court to resolve a controversy between Delaware and the defendant, State of New York (New York), as to which state is entitled to claim and take possession of certain unclaimed intangible personal property, consisting of monies and other intangible property (excess receipts),[1] held or formerly held by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York.

2. On December 12, 1988, Thomas Jackson was appointed Special Master in this case.

3. On February 21, 1989, this Court granted the motion of Texas to intervene and file its complaint in intervention in this case.

4. As set forth in detail in its amended complaint, Texas claims a portion of the excess receipts which constitute the subject matter of the original controversy between Delaware and New York, specifically, that portion of the excess receipts held or formerly held by securities brokerage houses incorporated in Delaware which are attributable to issuers incorporated in Texas.

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[1] In its complaint in intervention and amended complaint, the plaintiff in intervention, Texas, has defined certain terms related to this case. The State of Colorado incorporates those definitions into this motion by reference.

5. Texas also claims the right to take custodial possession of certain additional excess receipts, consisting of excess receipts attributable to issuers incorporated in Texas held or formerly held by the Depository Trust Company (DTC) and excess receipts which have arisen in connection with distributions made by Texas municipal and other governmental issuers (additional excess receipts) which are now being demanded by or remitted to New York. It is the understanding of the State of Colorado that this Court intends to consider claims to both the excess receipts originally at issue and the additional excess receipts identified by Texas.

6. Texas claims a portion of the excess receipts and the additional excess receipts for the reason that they constitute a debt owed by the issuer to the securities' beneficial owner. If the identity of the beneficial owner is unknown, the excess receipts and additional excess receipts should be remitted to the state of incorporation of the issuer under the state's unclaimed property law.

7. The State of Colorado claims a portion of the excess receipts and additional excess receipts at issue in this action, specifically, that portion of the excess receipts and additional excess receipts attributable to the issuers incorporated in the State of Colorado and that portion attributable to Colorado municipalities and other governmental entities.

8. The amount of excess receipts and additional excess receipts that the State of Colorado is entitled to claim is presently unknown. The State of Colorado has never, prior to this lawsuit, had any reason to identify and quantify such excess receipts and additional excess

receipts. However, it is probable that at least one issuer incorporated in the State of Colorado has generated excess receipts and/or additional excess receipts. Moreover, it is virtually certain that bonds issued by Colorado municipalities and other governmental entities have generated additional excess receipts subject to the claim of the State of Colorado.

9. The State of Colorado asserts its claim pursuant to Colo. Rev. Stat. §§ 38-13-101 to 38-13-134 (1988 Supp.), which provides that except as otherwise provided by this article, all intangible property, including any income or increment derived therefrom, that is held, issued or owing in the ordinary course of a holder's business and has remained unclaimed by the owner for more than five years after it becomes payable or distributable is presumed abandoned and is subject to the custody of this state as unclaimed property if the conditions raising a presumption of abandonment are satisfied. (*See* Colo. Rev. Stat. §§ 38-13-102(7)(a)(I)-(V) and (b), (6), (3) and 38-13-103 and 38-13-104 set forth in Appendix to this motion.)

10. The State of Colorado supports and adopts as if set forth fully by the State of Colorado in its own pleadings the brief in support of motion for leave to file and the amended complaint of Texas, and the factual and legal arguments set forth therein, to the extent the same are applicable and relevant to the claims of the State of Colorado set forth in paragraph seven of this motion.

11. It is essential that the State of Colorado be permitted to intervene in its own right in this proceeding. The decision of this Court will establish a rule of law

which will conclusively determine the future right of the State of Colorado to claim and take possession of unclaimed property similar or identical in nature to the excess receipts and additional excess receipts at issue in this case. Additionally, if the State of Colorado is to establish its claim and right to take custodial possession of a portion of the property presently at issue, it must have access to the discovery process in order to identify those excess receipts and additional excess receipts attributable to issuers incorporated in the State of Colorado. As a party, the State of Colorado can obtain a ruling from this Court recognizing its right to take possession of specific unclaimed property pursuant to its individual unclaimed property laws and ordering New York to tender such property to the State of Coloado.

12. Based on the foregoing, the State of Colorado is entitled to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). Alternatively, the State of Colorado urges this Court to exercise its discretion and grant the requested intervention pursuant to Fed. R. Civ. P. 24(b).

13. The intervention of the State of Colorado in this action will not unduly delay these proceedings or prejudice the adjudication of the rights of the present parties. To the extent that it can do so, Texas has offered to serve as lead counsel for those states, including the State of Colorado, wishing to intervene and represent themselves in this case. The addition of the State of Colorado as a plaintiff in intervention will not result, therefore, in an unmanageable increase in the number of parties to this litigation.

14. This court in *Western Union Telegraph Company v. Pennsylvania*, 368 U.S. 71 (1961), recognized the difficulties inherent in resolving controversies between different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that this Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." Id, at 79. *See also Pennsylvania v. New York*, 407 U.S. 206 (1972). It is such an opportunity to present its claim that the State of Colorado seeks by urging this Court to grant leave to intervene in this case.

THEREFORE, the State of Colorado requests that it be permitted to intervene as a party plaintiff in this case to assert the claims set forth in the attached complaint in intervention.

Respectfully submitted,

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State of Colorado

CHARLES B. HOWE
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COMPLAINT IN INTERVENTION

I.
INTRODUCTION

The State of Colorado (Colorado), the plaintiff in intervention, by Duane Woodard, Attorney General of the State of Colorado, with leave first had, files this complaint in intervention in the above styled and numbered cause, and states as follows:

II.

JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

III.

PENDING ACTION

2. On May 31, 1988, this Court granted the plaintiff State of Delaware's (Delaware) motion for leave to file a complaint invoking the original jurisdiction of this Court to resolve a controversy between Delaware and the defendant State of New York (New York) as to which state is entitled to claim and take possession of certain unclaimed intangible personal property held by securities brokerage firms in Delaware.

3. On February 21, 1989, this Court granted the State of Texas' (Texas) motion for leave to file a complaint in intervention. The Texas complaint also made subject to this suit certain additional unclaimed intangible personal property held by securities brokerage firms and non-brokerage firm intermediaries. On October 12, 1989 Texas filed its Amended Complaint.

IV.

INTEREST AND CLAIM OF COLORADO

4. Colorado acts by and through the Attorney General of Colorado, attorney for the Colorado State Treasurer, the state official who is charged under the laws of Colorado with the duty of prosecuting unclaimed property suits.

5. Colorado seeks a determination of its rights to certain of the unclaimed intangible personal property, referred to as "excess receipts" and "additional excess receipts," which comes into being and acquires its character as unclaimed property in the context of securities transactions.

6. Colorado is entitled to a portion of the excess receipts and additional excess receipts at issue in this litigation because they constitute a debt of the entity (issuer) initially issuing the shares of stock, bonds, debentures or other securities instruments owed to the entity or individual (beneficial owner) who has the economic rights to the security, including the entitlement to distributions.

7. If the identity and location of the beneficial owner is unknown, the state of incorporation of the issuer should be entitled to collect the excess receipts and additional excess receipts under that state's unclaimed property law. Under existing law and practice, a debt of identical character is remitted to the issuer's state of incorporation when held by the issuer's paying agent so it should be similarly remitted to the state of incorporation of the issuer when held by other agents in the

securities holding, transfer, and distribution system. Distributions generated by issuers incorporated in Colorado and those generated by Colorado which are unclaimed and whose beneficial owner is unknown, should be returned to Colorado. The claim of Colorado is based on the practical reality and manner in which securities are traded and distributions are paid, and relies upon a strict interpretation of the Court's holding in *Texas v. New Jersey*, 379 U.S. 674 (1965).

8. By this action, Colorado seeks a judgment that New York pay to Colorado all excess receipts and additional excess receipts attributable to issuers incorporated in Colorado and those that are attributable to Colorado municipalities. Colorado further seeks a declaration that it has the right in the future to claim and take possession of excess receipts and additional excess receipts without interference from any other state. Colorado additionally seeks an order from this Court enjoining and restraining New York from demanding or collecting such excess receipts and additional excess receipts, and from expending any such sums collected, but presently unspent, which are attributable to issuers incorporated in Colorado and to Colorado municipalities, until such time as this controversy is resolved.

9. Colorado asserts its claim pursuant to Colo. Rev. Stat. §§ 38-13-101 to 38-13-134 (1988 Supp.) which provides, in essence, for the custodial taking of abandoned or unclaimed property when the existence and location of the owner of the property is unknown to the holder of the property, and no claim to such property has been asserted within the applicable dormancy period, which for most types of personal property in Colorado is five years.

V.

DEFINITIONS

10. Colorado adopts by reference the definitions of the terms set forth by Texas in its amended complaint in intervention on pages 10 through 15.

VI.

PRAYER FOR RELIEF

THEREFORE, Colorado requests that this Court grant the following relief:

1. That Colorado be allowed to intervene in this case to protect its interests;

2. That New York be restrained and enjoined from collecting any excess receipts and additional excess receipts attributable to issuers incorporated in Colorado or attributable to Colorado governmental issuers, and from expending any sums collected but presently unspent, consisting of such excess receipts and additional excess receipts, until such time as this controversy is resolved;

3. That New York be directed to pay or deliver to Colorado all of the excess receipts and additional excess receipts paid or delivered to New York attributable to issuers incorporated in Colorado and Colorado governmental issuers which have been abandoned for the applicable dormancy period under Colorado's unclaimed property law.

4. That Colorado be granted such other and further relief as the court deems just and equitable.

Respectfully submitted,

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RICHARD H. FORMAN
Solicitor General

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APPENDIX

"Selected Sections of the Colorado Unclaimed Property Act"

Colorado Revised Statutes Part 1 of Article 13, Title 38.

38-13-102. Definitions and use of terms.

As used in this article, unless the context otherwise requires:

(3) "Banking organization" means a bank, trust company, savings bank, industrial bank, safe deposit company, or private banker or any organization defined by other law as a bank or banking organization.

* * *

(6) "Holder" means a banking or financial organization, wherever organized or domiciled, . . .

(7) (a) "Intangible property" includes:

(I) Moneys, checks, drafts, deposits, interest, dividends, and income;

(II) Credit balances, customer overpayments, gift certificates, refunds, credit memos, and unidentified remittances;

(III) Stocks and other intangible ownership interests in business associations;

(IV) Moneys deposited to redeem stocks, bonds, coupons, and other securities or to make distributions;

(V) Amounts distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance, or similar benefits.

(b) "Intangible property" does not include credit card accounts.

* * *

38-13-103. Property presumed abandoned – general rule.

(1) Except as otherwise provided by this article, all intangible property, including any income or increment derived therefrom, less any lawful charges, that is held, issued, or owing in the ordinary course of a holder's business and has remained unclaimed by the owner for more than five years after it became payable or distributable is presumed abandoned.

(2) Property is payable or distributable for the purpose of this article notwithstanding the owner's failure to make demand or to present any instrument or document required to receive payment.

38-13-104. General rules for taking custody of intangible unclaimed property. (1) Unless otherwise provided in this article or by other statute, intangible property is subject to the custody of this state as unclaimed property if the conditions raising a presumption of abandonment under section 38-13-103 and sections 38-13-105 to 38-13-109 are satisfied and:

(a) The last-known address, as shown on records of the holder, of the apparent owner is in this state;

(b) The records of the holder do not reflect the identity of the person entitled to the property and it is established that the last-known address of the person entitled to the property is in this state;

(c) The records of the holder do not reflect the last-known address of the apparent owner and it is established that:

(I) The last-known address of the person entitled to the property is in this state; or

(II) The holder is a domiciliary of this state and has not previously paid or delivered the property to the state of the last-known address of the apparent owner or other person entitled to the property;

(d) The last-known address, as shown on the records of the holder, of the apparent owner is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property and the holder is a domiciliary of this state;

(e) The last-known address, as shown on the records of the holder, of the apparent owner is in a foreign nation and the holder is a domiciliary of this state; or

(f) The transaction out of which the property arose occurred in this state and:

(I) (A) The last-known address of the apparent owner or other person entitled to the property is unknown; or

(B) The last-known address of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property; and

(II) The holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property.